No. 12468

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HERBERT WINDSOR and BAEDA E. WINDSOR, husband and wife,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

OPENING BRIEF FOR APPELLANTS.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

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Jurisdictional Statement.

This is an appeal from a judgment of the United States District Court for the Northern District of California in favor of the defendant in an action against the United States of America under the Tort Claims Act. Jurisdiction was conferred on the lower court under Title 28 U. S. Code, Sections 931 *et seq.* (now 28 U. S. C. 1346(b), 1402(b), 2402, and 2671-2680). Jurisdiction of this court is conferred by Title 28, U. S. Code, Section 1291 (formerly 28 U. S. C. 225). The tort for which the complaint was filed occurred in Yosemite National Park. All of Yosemite National Park is included within the Northern District of California by Title 28, U. S. Code, Section 84(a)(1). The venue of a Tort Claims Act suit is in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred. (See 28 U. S. C. 931(a)—now 28 U. S. C. 1402(b).)

Statement of the Case.

The appellants Herbert Windsor and Baeda E. Windsor filed their complaint in the United States District Court for the Northern District of California, on April 16, 1948 for a tort committed June 21, 1947, naming the United States of America and Yosemite Park & Curry Co., a California corporation, as defendants and praying for damages of $10,000.00 on the first cause of action and $463.50 on the second cause of action. [R. 2.]

The defendant, Yosemite Park & Curry Company filed its answer on June 17, 1948. [R. 8.] The defendant United States of America filed its answer on January 14, 1949. [R. 11.] When the case came on for trial on July 12, 1949, a motion to dismiss on behalf of the defendant Yosemite Park & Curry Company was granted [R. 27], and Judgment of Dismissal for lack of jurisdiction, as to said defendant, was filed on July 18, 1949. [R. 16.]

The case proceeded to trial as to the defendant, United States of America; was completed on July 12, 1949, and submitted on briefs. [R. 27 to 91, incl.] On October 31, 1949, the District Judge signed Findings of Fact and Conclusions of Law [R. 18 to 20, incl.], and Judgment in favor of the defendant United States of America and against the plaintiffs. [R. 16-17.] This judgment was entered in the Civil Docket by the clerk on November 1, 1949. [R. 17.] Notice of Appeal was filed on December 23, 1949. [R. 20-21.]

Questions Involved.

The questions involved in this appeal are, the failure of the court to find that the defendant, through its employees and agents, was negligent and, that such negli-

gence was the proximate cause of the plaintiffs' injuries. Also, the court erred in finding that the plaintiffs were contributorily negligent thus proximately contributing to the injuries.

Specification of Errors. [R. 25-26.]

1. In finding and holding that the defendant, United States of America, as a Lessor, owed no duty to the plaintiff, Baeda E. Windsor, and therefore, in the event of negligence, would not be liable for damages.

2. In finding and holding that the defendant, United States of America, had no control over the condition of the platform, the concrete step, or the surface of the parking lot, and was therefore free from any negligent act or omission.

3. In finding and holding that the defendant, United States of America, was not negligent.

4. In finding and holding that the plaintiff, Baeda E. Windsor, was negligent and that her negligence was the proximate cause of her injuries.

5. In refusing to find that the defendant, United States of America, as a lessor and landlord, was negligent.

6. In refusing to find that the defendant, United States of America, had exclusive control over the construction, maintenance, and repair of the parking area for motor vehicles.

7. In refusing to find that the defendant, United States of America, in constructing and otherwise maintaining the drain in the surface of the parking area, was negligent *per se*.

ARGUMENT.

POINT I.

Specification of Errors Nos. 1 and 5, Will Be First Discussed, but There Is No Clear Line Between the Argument Under Point I and Point II, the Latter Designated to Cover Specification of Errors Nos. 2 and 3.

The defendant, United States of America is the sole and exclusive owner of Yosemite National Park. *Collins et al. v. Yosemite Park & Curry Company,* 304 U. S. 518.

At the entrance to the Park an admittance fee is paid.

The said defendant as such owner, decided in the interest of efficient profitable management, and to facilitate good service to the general public, that it would grant the right to another by lease, to operate the hotels, pavilions, novelty shops, grocery stores, meat markets, garages, service stations, etc.—in the same manner as the owner of a large amusement park grants ground concessions within his amusement park. [R. 29.] Exhibit Number 8, is the lease made by the defendant, United States of America, through the Executive Authority, Department of the Interior, with its lessee Yosemite Park & Curry Company.

Plaintiffs entered the Park June 21, 1947. [R. 33.]

As stated by the Court of Appeals for the Ninth Circuit in the case of *King v. Yancey,* 147 F. 2d 379, and quoting from the case of *Smith v. Pickwick Stages System,* 113 Cal. App. 118:

> ". . . plaintiff was there as one of three classes of persons: a Trespasser, Licensee, or an Invitee."

As the plaintiffs were within Yosemite National Park at the instance of both the lessor and the lessee, they were invitees. It was therefore incumbent upon the defendant to exercise ordinary care toward the plaintiffs in the care of the premises under their control. The term ordinary care is a relative term, and the standard by which it is to be measured varies with the circumstances attending each particular case. As stated by the court in *Burns v. Dunham,* 148 Cal. 208:

> "When any degree of care is required in the performance of an act, what constitutes the exercise of that particular degree, always has relation to the nature of the act itself." (See also 19 Cal. Jur. 581.)

What were the surrounding circumstances that would have bearing upon the standard of care?

> "A. Well, sunset was around close to 8 o'clock that night, but 3,000, 3,300 feet mountain right back of the lodge, and night comes rather early out there, but it wasn't—the street lights were just across the street, a big bonfire 100 feet across the street right in front of the lodge.
>
> Q. Was the bonfire lighted, do you remember? A. Oh, yes.
>
> Q. Were the street lights on at that time? A. Yes.
>
> Q. The street lights across the street. A. Right across, probably 75 feet from the platform." [R. 79; see also R. 56, bottom of page.]

The defendant permitted its lessee to operate an eating house on the valley floor at a depth of more than a half a mile permitting their lessee to serve meals in the evening. The patrons were provided with a place to park their motor vehicles and a certain avenue or avenues of entrance were provided from the said parking area, to the eating house operated by defendant's lessee. [R. 34, 35 and 68.]

From the surface of the parking area to the elevation even with the threshold of the eating house, a patron, arriving by motor vehicle, must negotiate (1) from the surface of the parking area to the top of a certain bulkhead, curb, or concrete step; (2) from the top of the concrete step to the top of a platform, and (3) from the top of the platform to the level of the porch. This would be the cross sections laid out on Plaintiff's Exhibit 1. [R. 28.]

The dimensional elevations of these levels are not uniform, varying an inch or so at different points, but from one level to the other, the evidence leaves no uncertainty.

> "A. Yes, the dimensions were the dimension lines from the top of the concrete up to the top of the platform, and it varies from 7 inches to 8 inches on that distance, and then if you want to drop down from the concrete, from the concrete down to the pavement, down to the bottom of the gutter, there is a dimension line there, an arrow pointing to it which varies from 7½ inches to 12 inches. From the concrete, top of the block, to the bottom of the gutter, and then at the bottom, the depth of the gutter varies from one inch to two inches, width from 6 to 10 inches."

The witness is here testifying from the drawings furnished by the defendant United States, and admitted into evidence as Plaintiff's Exhibit 1. [R. 51-52.]

To determine the standard of care one must first ask, under the circumstances, what would the ordinary prudent person do, and then measure the conduct of the plaintiffs with that behavior.

The plaintiffs parked their car at right angles to the bulkhead or step, in the same manner that a person parks a car on the street. The fact is, defendant's witness, J. I. McMullen, has called the specific area a street. [R. 79.] In getting out of their motor vehicle, not meeting any bar or barrier in the shape of a railing, not being advised of any specified route by sign or notice and facing a curb of 10 inches, what would the ordinary prudent person do?

> "When through a long period of years a particular mode of conduct has been followed as the proper and reasonable mode of a prudent man to follow under particular circumstances, one cannot be charged with negligence in following that mode of conduct alone."
>
> *Denman v. City of Pasadena,* 101 Cal. App. 769.

Under the acknowledged existing physical facts and attendant circumstances of parking their automobile, what course of conduct would be expected from an ordinary prudent person traversing the distance to the door of the cafeteria? The trial court was exercised about this phase of the plaintiff's conduct.

> "By the Court: Then when you got out on the right, got out of that car, what did you do, step

right up, you and your wife, and boy, step right up onto this cement step and then from there onto the wooden platform and then go over to the stairs and go on to the porch and then go from the porch into the Cafeteria? A. That is the way we went, stepped right up on the platform from the car.

Q. All three of you did that? A. Yes, sir.

The Court: That is all I want.

Q. (By Mr. Deasy): You were going back the same route in reverse when the accident happened?

A. We went right toward our car." [R. 67.]

Thus the plaintiffs entered Yosemite Park. They stopped their car in front of the Lodge Cafeteria, got out of their car, stepped right up on the concrete curb step or bulkhead, mounted the platform at the point where their car was parked, crossed the platform, ascended some steps from the platform to the porch, entered the Lodge Cafeteria, had their dinner, and followed the same line of travel back to their motor vehicle.

The duty owed:

"It is the duty of a property owner to provide safe means of entrance and exit both for the tenants and the latters' invitees. (*Gerard v. Wilson Holding Company,* 79 Cal. App. 2d 553.)

POINT II.

As Remarked Above, This Is a Continuation of Point I and Embraces Nos. 2 and 3 in the Specification of Errors.

"One who leases part of the premises, retaining control of other portions, such as common walks or passages, which the tenant is entitled to use, is subject to liability to persons lawfully on the land, with the consent of the tenant, for damages caused by a dangerous condition existing on the part under owner's control, if by reasonable care he could have discovered the condition and made it safe. (Several cases cited.) Accordingly, invitees of the tenant are regarded as being invitees of the owner while on passageways which invitees of the tenant have a right to use and which are under the owner's control."

Johnston v. De La Guerra Properties, Inc., 28 Cal. 2d 394 (see also Restatement of Torts, Chap. 13, Sec. 359).

"When a landlord retains or has control of a portion of the leased premises, the responsibility rests upon him to see that no injury results to those having rights there because of the way in which that portion is occupied or used." (15 Cal. Jur. 741. Cases thereunder.)

The plaintiffs have attempted to show that the defendant United States of America, as a lessor, owed a duty to the plaintiffs to use care by reason of their relationship. Then by reason of the surrounding circumstances, the plaintiffs have attempted to establish the nature and extent of the duty so owed. The plaintiffs will now attempt to show how that breach of duty caused the injuries from which the plaintiffs seek damages.

The plaintiff, Baeda E. Windsor, at about the hour of 8 P. M. crossed the threshold of the door of the cafeteria out onto the porch. Now there is no testimony as to which set of stairs were used by the said plaintiff in descending from the porch to the level of the platform. It will be noted on the drawing that there are three sets of steps, one in the middle and one on each side thereof. These may be noted upon the drawings—Exhibit 1.

Her path of travel, after descending the steps from the porch was to cross the platform to her motor vehicle. The angle she crossed the platform would depend upon the exact position of her car and the specific set of steps she descended from the porch. Both of these facts are unknown. The witnesses have testfied that there were no markings on the platform. [R. 79-80.] There is testimony that there was no railing upon the platform [R. 34], nothing to indicate any defined line of travel and each motor vehicle was in the same relationship as all others that were parked in front of the platform.

The evidence indicates that her son preceded her in crossing the platform, and that her husband was behind her. The testimony concerning her approach to the edge of the platform and the movement of her feet is quite clear. [R. 34-36; 91.]

She was thrown off balance by something at the edge of the platform, and she quickly stepped down to the concrete step with her right foot, and then with her left foot to the paved parking area. These two steps lowered her body about 17 inches. This is not the testimony of a falling person. It is the testimony of an alert individual who had responded to an incipient loss of balance only.

There had been constructed in the surface of the paved parking area, directly adjacent to, and parallel with the face of the concrete step, a drain or gutter, indicated upon the exhibits and testified to from the drawings as being 1 to 2 inches deep and 6 to 10 inches wide. [R. 51.]

The plaintiff testified that she extended her left foot to regain her balance and the heel of her said left foot came to rest at the bottom of the gutter and the ball of her foot on the ridge. [R. 36-37.] This uneven loading on the bones in the ankle joint caused a fracture and simultaneously generated a reflex and she brought the right foot down to still regain her balance. This foot landed, as would be expected, in the same place as the other, to-wit, with the heel in the gutter and the ball of the foot on the ridge. This identical unequal loading on the bones of the ankle, caused identical injuries to the fibula in both extremities. [Exhibits 9 and 10; R. 29-30.] It is significant to point out that the plaintiff has never complained of any other injuries except these fractured bones. No bruises or contusions, sprains or trauma. Dr. Sturm makes no mention of anything more than "oblique fractures of the lower end of each fibula." Does this not support the testimony of the plaintiff and refute the testimony that she fell. [R. 78.] The testimony of Herbert D. Windsor was ". . . I saw her put the other foot down and slump to the pavement." [R. 57.]

Digressing for the moment, there is the question as to the legal aspects of the fact that the plaintiff lost her balance upon the property leased to the tenant and broke

her ankles on the property owned by the landlord. Upon this question of proximate cause Professor Beale writes in 33 Harv. Law Review 663:

> "4. If the defendant has created a passive force, condition, situation or risk, which foreseeably increases the chances of harm through an active force not created by the defendant, then proximate cause exists."

Restatement of Torts, Secs. 431 and 439.

> "The actors negligent conduct is a legal cause of harm to another if—
>
> (a) His conduct is a substantial factor in bringing about the harm.
>
> "If the effects of the actor's negligent conduct actively and continuously operate to bring about harm to another the fact that the active and substantially simultaneous operation of the effects of a third person, innocent, tortious or criminal act, is also a substantial factor in bringing about the harm, does not protect the actor from liability."

California cases in point:

Keiper v. Pacific Gas & Elec., 36 Cal. App. 362;

Crabbe v. Rhodes, 101 Cal. App. 503.

Plaintiffs contend that the lessee's negligence consisted in the "chewed up" condition of the edge of the platform. [R. 46.]

Plaintiffs further contend that the lessor's negligence consisted in the presence of a drain or gutter in the surface of the paved parking area, adjacent to a place where people step down from a higher elevation. [R. 51-52.]

POINT III.

The Next Assignment of Errors Is Nos. 6 and 7 in the Specification of Errors. This Involves the Principles and Rules in the Law of Master and Servant and the Doctrine of Respondeat Superior, as It Is Applied to the Tort Claims Act. (U. S. C. Title 28, Sections 1346 and 2674.)

> "Under Federal Tort Claims Act, whether employee of the Federal Government was acting in line of duty at time of accident so as to render the government liable for his negligence, must be determined by doctrine of *respondeat superior* in like manner as it would be determined in case of a private person under that doctrine."
>
> *Hubach v. United States,* 174 F. 2d 7.

This is a waiver of sovereign immunity and postulates the question of interpretation. The recent case of *United States v. Aetna Cas. & S. Co.,* advance opinions of Law Ed., Vol. 94, p. 151, decided by the Supreme Court declares, in headnote 8:

> "The doctrine that statutes waiving sovereign immunity must be strictly construed is not applicable to the Federal Tort Claims Act."

Who were the servants of the defendant United States of America, acting within the scope of their authority, were negligent, and by that negligence caused the injuries for which the plaintiffs press their suit for damages?

Exhibit 12 is a building code that was secured from the Department of the Interior, and counsel for the de-

fendant, United States of America, stipulated that Mr. Cecil J. Doty, regional architect would testify as to the existence of this code. [R. 30-31.] Here then is evidence of the existence of qualified engineers, employees of the defendant acting within the scope of their authorioty, in a division of the Executive branch of the United States of America, owners and operators of Yosemite Park. In connection with this building code, and its relation to the immediate question, the court is respectfully requested to read Article XII of the lease and thereafter to read the following section of the building code, namely—3302, 3305, 3306, and 3307, all sections in chapter 33 thereof.

Apparently the drain, cast in the concrete pavement, was adjacent to the step and one might expect a patron to step over it. The constructors may not have anticipated the plaintiff's manner of injury; but it is urged that by the exercise of ordinary care, the agents and servants of the defendant, United States of America, should have foreseen that it was dangerous.

> "If the negligent act or omission is one which a person ought, in the exercise of ordinary care, to have anticipated was likely to result in injury to others, he is liable for any injury proximately resulting therefrom, although he might not have foreseen the particular injury which did happen."

Lim Ben v. Pacific Gas & Electric, 101 Cal. App. 174;

Bowley v. Margrum & Otter, 3 Cal. App. 232.

In California, *Clowdis v. Fresno Flume and Irrigation Co.,* 118 Cal. 315 is a leading case in the law of Master and Servant.

> "Where a duty is owed to the public, a servant to whom its performance is intrusted represents the master, however subordinate or menial his task may be, and within the scope of his employment to perform such duty, his Knowledge is the Master's Knowledge, and his acts the master's acts, and the injury as to the master's responsibility is the same as if he had personally entered upon the performance of the duty, under the same circumstances, and with the same knowledge possessed by his servant; nor can a failure to perform such duty, or its improper performance, be excused by showing that its execution was intrusted to a servant even of approved carefulness, knowledge, or skill; but it must be further shown that the servant, in the particular matter, exercised the full degree of care, and showed the requisite amount of skill."

POINT IV.

The Final Assignment of Error Is No. 4 in the Specification of Errors.

Was the plaintiff, Baeda E. Windsor, negligent, and did her negligence contribute to her injuries?

There was considerable testimony about certain markings and their influence upon the conduct of an ordinary person. Now there were no markings on the porch, on the platform or on the concrete step. [R. 65, 79-80.] From the testimony it appears that there were two white lines on the paved parking area that crossed the street. [R. 65.] This would be a cross-walk for pedestrians. Was it negligence on the part of the plaintiffs, after parking their car at the lower end away from the cafeteria [R. 66], because the parking stalls directly adjacent to the concrete step were ". . . full of cars" [R. 83.], was it negligent conduct to step right up on the "sidewalk" at that point? Was it incumbent upon the plaintiffs to have noted that cross-walk as they drove over it, and then, when they got out of their car, to have passed along the rear of the parked automobiles so that they might use a few feet of the cross-walk? If the servants of the defendant desired this mode of travel, why did they not have a barrier by a railing instead of constructing it the way they did? The means of approach at any point along the concrete step were the same, and as stated above, much like a person parking against the curb on a street.

The trial court declared that no argument was needed upon the facts but stated—"Also the point that the lady was taking a short cut, not going where pedestrians should go." [R. 86.] It is earnestly urged that the course of conduct of the plaintiffs does not show that the lady took

a short cut, and that her course of travel, as she came out of the cafeteria, was where pedestrians should not go. Assuming for the moment that, after eating, plaintiffs had gone to the Curio Store before going to their automobile. Upon leaving the Curio Store they might have descended the steps at the far end of the porch, away from the cafeteria. Under this assumption what course of conduct, or line of travel, would have been expected of the ordinary person?

Well settled principles of law place upon a person the responsibility of recognizing danger and a dangerous condition. The plaintiffs knew it was dark, and as the place was full of cars, shadows may have added to the patent peril of the surroundings; but it is contended that the conduct of the plaintiff was that of the ordinary person under the circumstances.

The plaintiff's testimony of caution, corroborated by the testimony of her husband, and supported by the nature and manner of her injuries, is in sharp contrast to the testimony of Mr. J. I. McMullen, the Government's only witness.

> "A. Yes, I saw a lady fall off the porch." [R. 78.]
>
> "A. She fell right off onto the ground." [R. 78.]

It is the position of the plaintiffs that (1) a dangerous condition was created by the defendant's servants, acting within the scope of their authority, or (2) that the dangerous condition, under the circumstances, ought to have been anticipated, and (3) that the plaintiff Baeda Windsor did exercise due caution and circumspection commensurate with the existing danger,—same consisting of the absence of proper lighting and handrails. She can only be charged

with negligent conduct, if her conduct, at the time of injury, was not that of the ordinary person under the circumstances.

> "The defendants in this action have set up in their answer the plea of contributory negligence. You are instructed that such plea is an affirmative defense, and the burden of proof rests on the defendants to establish it, if any. You are not to assume the existence of contributory negligence in the absence of evidence merely from its being pleaded by the defendant, and contributory negligence, if any, must proximately cause injury before it can bar a right to recovery."

In *Breaks v. Anderson,* 95 A. C. A. 802, this instruction was held to be a correct statement of the law. Further on, in the same case:

> "A party has succeeded in carrying his or her burden of proof on an issue of fact, if the evidence favoring his or her side of the question is more convincing than that tending to support the contrary side."

Conclusion.

The plaintiffs submit that the findings of fact of the court below are incorrect and that the conclusions drawn therefrom are not in accordance with law.

In the *Collins v. Yosemite Park & Curry Company* case, it is established that the United States of America are the proprietors of Yosemite National Park.

The lease discloses a profitable relationship of landlord and tenant by virtue of a *quasi*-monopoly.

There was a building code set up by an agency of the Executive Department of the United States Government, clothing skilled employees, with authority to construct,

alter, and otherwise maintain and administer the premises within the Park.

Under the Tort Claims Act, the said proprietor (and as lessor and lessee), shall be considered . . . "in like manner as it would be determined in case of a private person under that doctrine." (*Respondeat superior.*)

Hubach v. United States, supra.

The plaintiff, Baeda E. Windsor, as an invitee, was injured by reason of a dangerous condition, either purposely created, but in any event permitted to exist, by the defendant, United States of America.

Accordingly it is submitted that the judgment in favor of the defendants should be reversed, and judgment in favor of the plaintiffs should be ordered.

Respectfully submitted,

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Attorney for Appellants.